THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID#: 0610023116
	)	
DEREK MILLER,	)	
Defendant.	)	

Submitted: April 30, 2009
Decided: June 26, 2009

ORDER

Upon Defendant's Motion for Postconviction Relief – *DENIED*

1. On November 27, 2006, Defendant was indicted on four charges of first degree rape, one count of continuous sexual abuse of a child and one count of first degree unlawful sexual contact. On August 2, 2007, everyone was ready for trial. Instead of going to trial when he finally had the chance, Defendant pleaded guilty to continuous sexual abuse of a child. Twice during the plea colloquy, Defendant admitted he was, in fact, guilty. The court warned Defendant that he would not be allowed to back out of the plea later.

2. On January 18, 2008, Defendant was sentenced to 15 years in prison. Defendant did not file a direct appeal. Instead, on January 30, 2008, Defendant filed a motion for postconviction relief. On February 6, 2008, Defendant filed a second

motion for postconviction relief. Thereafter, Defendant filed 13 letters, each one recapitulating his complaints about his plea and sentence.

3. The State filed a helpful response on June 25, 2008. Defendant replied on July 31, 2008. Defendant's serial, *sui generis* submissions continued, causing the court to issue a February 20, 2009 letter informing Defendant that each submission extended the time in which the court would decide his motion. For the most part, that worked.[1]

4. Defendant's motion presents four grounds for relief: (1) ineffective assistance of trial counsel, (2) "unfulfilled plea agreement" for two to five years imprisonment, (3) failure to suppress damaging evidence, and (4) ineffective assistance of sentencing counsel. The first and third claims are one in the same.

5. First, Defendant must realize that the court is not bound by the State's sentencing recommendation or the Truth-In-Sentencing guideline.[2] That fact was thoroughly discussed with Defendant during the colloquy, especially after a sentencing guideline mistake was corrected on the record. Even though the TIS form initially contained a typo, that mistake was clarified and thoroughly presented to Defendant on the record. The court repeatedly told Defendant that despite the

[1] Defendant sent a letter to the President Judge on April 30, 2009.

[2] *See Fuller v. State*, 860 A.2d 324, 332-33 (Del. 2004); *Rojas v. State*, 807 A.2d 1128 (Del. 2002) (TABLE).

agreement, there were no guarantees as to his sentence.

6. The TIS form correctly listed two to five years as the TIS guideline, however, the sentencing range was listed as two to 20 years when the actual maximum for continuous sexual abuse of a child is 25 years. During the colloquy, the State interrupted the court and corrected that mistake. The court noted that correction on the record and thoroughly informed Defendant that "regardless of what the State finally recommends, the court is not bound by it. You could receive anything from [two years] up to 25 full years in prison. Do you understand all of that?" Defendant answered: "Yes." The court then asked: "So you're pleading guilty and taking your chances?" Defendant answered: "Yes."

7. For present purposes, the court will pretend that when Defendant signed the plea, he had assumed that he would receive no more than five years. That assumption, however, was clearly dispelled by the above colloquy. Moreover, the court specifically asked Defendant, orally and in writing, if he was promised anything in an attempt to compel a guilty plea. Defendant answered, orally and in writing: "No."

8. As mentioned above, the court specifically asked Defendant, twice, if he was pleading guilty because he was, in fact, guilty. Twice, Defendant answered "yes."

9. The court remains satisfied that Defendant's plea was knowing, voluntary, and intelligent.[3] That finding is reinforced by Defendant's May 13, 2008 letter, stating "I've just never gone to a trial[,] I always pled out." In other words, Defendant was not a newcomer to the process and was fully aware of his rights and the rights he waived. The court throughly informed Defendant that is was possible he would receive a heavy sentence. If Defendant had any questions or concerns about his possible sentence, he had many opportunities to voice them. Therefore, his "unfulfilled plea agreement" claim has no merit.

10. As to Defendant's ineffective assistance of counsel claims, Defendant asserts that he was "railroaded" by his trial counsel into pleading guilty because counsel was unprepared for trial. Defendant mainly claims that counsel failed to meet with him to discuss the case and to subpoena witnesses. Defendant also claims counsel was ineffective for failing to suppress a blanket, taken from the child victim's bedroom, that contained Defendant's sperm.

11. Because Defendant knowingly, voluntary and intelligently pleaded guilty, he waived his right to bring his ineffective assistance of trial counsel claims. "[A] voluntary guilty plea constitutes a waiver of any alleged errors or defects

[3] *See State v. Miller*, I.D. #0610023116, Silverman, J. (Del. Super. Dec. 18, 2007) (ORDER).

occurring prior to the entry of the plea."[4]

12. Moreover, as mentioned above, the court warned Defendant, twice, that it would be virtually impossible to back out of the plea once it was accepted. Further, the court specifically asked, orally and in writing, if Defendant was satisfied with his attorney, and he was. If Defendant felt his attorney failed to properly represent him, he could and should have presented that issue in open court before he pleaded guilty.

13. Even if Defendant's claims were not waived, which they were, he cannot escape the fact that his sperm was found on a blanket belonging to the child victim. The fact that evidence is damaging to one's case does not constitute a ground for suppression. Defendant asserts the blanket was his, but he fails to address the fact that the blanket was taken from the victim's bedroom. Counsel's interviewing witnesses Defendant had in mind would not remove the stain from the victim's blanket.

14. Moreover, in his affidavit, trial counsel asserts that he did, in fact, subpoena witnesses. That is consistent with Defendant's reply brief, which contained a notarized letter from Defendant's mother, stating "[trial counsel] did subpoena a couple [witnesses], but not the ones that were most important." Even if his claims

[4] *Johnson v. State*, 962 A.2d 917 (Del. 2008) (TABLE).

were not waived, Defendant fails to overcome the presumption that trial counsel acted reasonably by subpoenaing certain witnesses and not others.[5] In this situation, where the Defendant is admittedly guilty and the victim's statement is corroborated by physical evidence, the presumption is even stronger.

15. Similarly, Defendant fails to overcome the presumption that sentencing counsel was reasonable in refusing to re-file the motion to withdraw Defendant's guilty plea. As discussed above, Defendant does not have a reason that justified withdrawal of his known, voluntary and intelligent plea. In his affidavit, sentencing counsel correctly stated he "saw no reason to ask for a withdraw of the guilty plea." Defendant has offered nothing to rebut counsel's belief that no valid argument for the plea's withdrawal existed.

16. Ultimately, Defendant made the best of a bad day. Defendant could have gone to trial and taken his chances, which probably would have resulted in even a harsher prison term. In other words, had Defendant gone to trial instead of pleading guilty on August 2, 2007, he would be in a worse predicament now. Only after the greater threat had passed, did it seem to Defendant that his then voluntary

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[5] *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (Defendant must overcome the strong presumption that counsel's actions "might be considered sound trial strategy") (quoting *Michael v. Louisiana*, 350 U.S. 91, 101 (1955)); *accord*, *Albury v. State*, 551 A.2d 53, 59 (Del. 1988) (an ineffective assistance of counsel claim is "subject to a strong presumption that counsel's conduct was professionally reasonable").

plea was a mistake.

For the foregoing reasons, Defendant's motion for postconviction relief is **DENIED.**

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Criminal)
Josette D. Manning, Deputy Attorney General
Derek Miller, *Pro Se*